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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BANK OF AMERICA, N.A.,

Plaintiff

v.

MARAVILLA AT MOUNTAIN'S EDGE
HOMEOWNERS ASSOCIATION, et al.,

Defendants

Case No.: 2:16-cv-00262-APG-BNW

**Order (1) Denying Defendant SFR's
Motion for Summary Judgment,
(2) Granting Plaintiff's Motion for
Summary Judgment, (3) Dismissing
Plaintiff's Alternative Damages Claims as
Moot, (4) Denying as Moot Defendant
Maravilla's Motion for Summary
Judgment, and (5) Setting Deadline for
Further Action**

[ECF Nos. 78, 79, 80]

Plaintiff Bank of America, N.A. sues to determine whether a deed of trust encumbering property located at 8928 Marble Light Avenue in Las Vegas, Nevada was extinguished by a nonjudicial foreclosure sale conducted by a homeowners association (HOA), defendant Maravilla at Mountain's Edge Homeowners Association (Maravilla). Defendant SFR Investments Pool 1, LLC (SFR) purchased the property at the foreclosure sale.

Bank of America seeks a declaration that the deed of trust still encumbers the property. It also asserts alternative damages claims against Maravilla and Maravilla's foreclosure agent, defendant Nevada Association Services, Inc. (NAS). SFR counterclaims for declaratory relief that it purchased the property free and clear of the deed of trust. SFR also filed a declaratory relief cross-claim against the former homeowners, Arturo and Gabriela Osuna.

Bank of America, SFR, and Maravilla move for summary judgment on a variety of grounds. The parties are familiar with the facts, so I do not repeat them here except where necessary. I grant Bank of America's motion and deny SFR's motion because no genuine dispute remains that Bank of America tendered the superpriority amount, thereby extinguishing

1 the superpriority lien and rendering the sale void as to the deed of trust. I dismiss as moot Bank
2 of America’s alternative damages claims against Maravilla and NAS, so I also deny as moot
3 Maravilla’s motion for summary judgment. Finally, I set a deadline for SFR to either voluntarily
4 dismiss its cross-claim against the Osunas or to move for default judgment on that claim.

5 **I. ANALYSIS**

6 Summary judgment is appropriate if the movant shows “there is no genuine dispute as to
7 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
8 56(a), (c). A fact is material if it “might affect the outcome of the suit under the governing law.”
9 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if “the evidence
10 is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

11 The party seeking summary judgment bears the initial burden of informing the court of
12 the basis for its motion and identifying those portions of the record that demonstrate the absence
13 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The
14 burden then shifts to the non-moving party to set forth specific facts demonstrating there is a
15 genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531
16 (9th Cir. 2000); *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018) (“To defeat
17 summary judgment, the nonmoving party must produce evidence of a genuine dispute of material
18 fact that could satisfy its burden at trial.”). I view the evidence and reasonable inferences in the
19 light most favorable to the non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523
20 F.3d 915, 920 (9th Cir. 2008).

21 Under Nevada law, a “first deed of trust holder’s unconditional tender of the superpriority
22 amount due results in the buyer at foreclosure taking the property subject to the deed of trust.”
23 *Bank of Am., N.A. v. SFR Investments Pool 1, LLC*, 427 P.3d 113, 116 (Nev. 2018) (en banc). To

1 be valid, tender must be for “payment in full” and must either be “unconditional, or with
2 conditions on which the tendering party has a right to insist.” *Id.* at 118.

3 Under Nevada Revised Statutes § 116.3116(2) as it existed at the time of the HOA sale in
4 this case, the HOA’s lien was superior to the deed of trust “to the extent of” any maintenance and
5 nuisance abatement charges and “to the extent of the assessments for common expenses based on
6 the periodic budget adopted by the association . . . which would have become due in the absence
7 of acceleration during the 9 months immediately preceding institution of an action to enforce the
8 lien.” An HOA institutes an action to enforce the lien “when it provides the notice of delinquent
9 assessment.” *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 388
10 P.3d 226, 231 (Nev. 2017). The superpriority amount thus consists of those assessments that are
11 actually unpaid for up to nine months prior to the notice of delinquent assessment lien. *SFR Invs.*
12 *Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 411 (Nev. 2014) (en banc) (describing the
13 superpriority lien as “consisting of the last nine months of unpaid HOA dues and maintenance
14 and nuisance-abatement charges”); *Saticoy Bay LLC, Series 346 S Milan St. v. MetLife Home*
15 *Loans, LLC*, Nos. 74127, 74386, 437 P.3d 168, 2019 WL 1244785, at *1 (Nev. 2019) (rejecting
16 the argument “that the superpriority portion includes an amount equal to 9 months of HOA
17 assessments, regardless of whether they were actually owed when the enforcement action
18 commenced”).

19 Bank of America has met its initial burden on summary judgment of establishing that it
20 tendered the superpriority amount in full. The monthly HOA assessment was \$69 per month.
21 ECF No. 79-12. At the time NAS recorded the notice of delinquent assessment lien on May 31,
22 2011, the prior homeowners owed three months of unpaid assessments plus a forwarded balance
23 of \$216, which I will assume consists of unpaid assessments, for a total superpriority amount of

1 \$423.¹ ECF Nos. 79-4; 79-12. Prior to the HOA foreclosure sale, Bank of America tendered
2 \$540 to NAS to cover the superpriority amount. ECF No. 79-7 at 11-19. NAS refused to accept
3 the check. *Id.* at 15, 19. SFR has presented no contrary evidence in response. Consequently, no
4 genuine dispute remains that the superpriority lien was extinguished and the property remains
5 subject to the deed of trust. *Bank of Am., N.A.*, 427 P.3d at 121.

6 SFR raises several arguments as to why tender did not extinguish the superpriority lien.
7 None raises a genuine dispute precluding summary judgment.

8 **A. Two HOA Liens**

9 SFR contends that there were two HOAs with delinquent assessment liens for this
10 property and, under the applicable law, those liens have equal priority. SFR thus argues that
11 Bank of America had to tender the superpriority amount to each HOA in order to preserve the
12 deed of trust from being extinguished by the foreclosure sale. Bank of America argues that there
13 is no dispute it tendered the superpriority amount to Maravilla, which is the only HOA lien that
14 was foreclosed. Bank of America also contends that, in any event, it tendered the superpriority
15 amount to both HOAs.

16 Bank of America has presented evidence that it tendered the superpriority amount to both
17 HOAs. ECF Nos. 79-7; 79-12; 86-1. Moreover, I have previously rejected SFR's argument that
18 both HOA liens must be satisfied, and I do so again here. *See Bank of New York Mellon v. Seven*
19 *Hills Master Community Ass'n*, 2:16-cv-01128-APG-NJK, ECF No. 64 at 7-8.

20 **B. Evidentiary Challenges**

21 SFR contends Bank of America cannot rely on NAS's ledger to prove the superpriority
22 amount because the ledger is not authenticated by an employee of Maravilla. SFR also argues
23

¹ There is no evidence of maintenance or nuisance abatement charges.

1 that Bank of America asks the court to assume there are no maintenance or nuisance abatement
2 charges. Next, SFR challenges the affidavit of Adam Kendis, a paralegal with the law firm
3 Miles Bauer Bergstrom & Winters, LLP (Miles Bauer). And it argues that another Miles Bauer
4 attorney, Douglas Miles, testified in another action that he does not retrieve or review the records
5 himself, so the court should view the Kendis affidavit with suspicion.

6 Bank of America responds that Kendis need not be a custodian of records for NAS or
7 Maravilla to authenticate the ledger, and Kendis stated that the ledger is what it appears to be,
8 which is the ledger NAS sent to Miles Bauer in response to the Miles Bauer letter requesting the
9 superpriority amount. Additionally, Bank of America contends NAS produced the same ledger
10 from its own documents.

11 Bank of America has presented sufficient proof from which a reasonable jury could find
12 the ledger from NAS “is what its proponent claims.” Fed. R. Evid. 901(a). Kendis states he has
13 personal knowledge of Miles Bauer’s procedures for creating and maintaining its business
14 records and he sets forth the prerequisites for the business records exception to hearsay. ECF No.
15 79-7 at 2; Fed. R. Evid. 803(6). The business records exception does not require that the
16 custodian of records for the business that created the document be the one to authenticate it. *See*
17 *MRT Const. Inc. v. Hardrives, Inc.*, 158 F.3d 478, 483 (9th Cir. 1998). Rather, someone from
18 another business (like Miles Bauer) who relied upon the accuracy of the business record may
19 properly authenticate it. *Id.* Miles Bauer’s records show it requested the superpriority amount
20 from NAS, and NAS responded by providing a ledger for this property. ECF No. 79-7. Miles
21 Bauer then tendered \$540 to NAS. *Id.*

22 Even if this evidence is not currently in admissible form, Bank of America need not
23 present the evidence in admissible form at summary judgment. *Fraser v. Goodale*, 342 F.3d

1 1032, 1036 (9th Cir. 2003) (“At the summary judgment stage, we do not focus on the
2 admissibility of the evidence’s form. We instead focus on the admissibility of its contents.”).
3 Bank of America could call witnesses from the HOA to identify the monthly assessment amount
4 and from Miles Bauer and NAS to testify about the tender attempt. Because the evidence could
5 be presented in admissible form at trial, I may consider it at summary judgment. *Id.*

6 SFR has presented no evidence to suggest the monthly assessment amount is anything
7 other than what is reflected in NAS’s ledger, and it has presented no other evidence of
8 maintenance or nuisance abatement charges. SFR therefore has failed to raise a genuine dispute
9 about the superpriority amount. *See Bank of Am., N.A. v. Arlington W. Twilight Homeowners*
10 *Ass’n*, 920 F.3d 620, 623 (9th Cir. 2019) (holding tender of nine months of assessments was
11 sufficient where the HOA’s “ledger did not indicate that the property had incurred any charges
12 for maintenance or nuisance abatement”). SFR’s reliance on testimony by a different affiant in a
13 different case about a different property does not raise a genuine dispute in this case. SFR “must
14 do more than simply show that there is some metaphysical doubt as to the material facts.”
15 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). It has not done so
16 here. *See Nationstar Mortgage LLC v The Springs at Spanish Trail Ass’n*, 2:15-cv-01217-JAD-
17 GWF, 2019 WL 2250264, at *5 (D. Nev. May 24, 2019) (rejecting similar evidentiary
18 challenges).

19 In sum, SFR does not present any evidence to dispute the superpriority amount, the
20 existence or nonexistence of maintenance or nuisance abatement charges, or tender.
21 Consequently, no genuine dispute remains that Bank of America tendered the superpriority
22 amount, thereby extinguishing the superpriority portion of the lien and rendering the HOA sale
23 void as to the deed of trust.

1 **C. Impermissible Conditions**

2 SFR contends Chapter 116 precluded the HOA from entering into a contract with Bank of
3 America through acceptance of the Miles Bauer tender that would waive the HOA's rights to a
4 superpriority lien. Specifically, SFR argues that the Miles Bauer tender letter contained an
5 impermissible condition that the HOA waive or subordinate its right to the portion of the
6 superpriority lien consisting of maintenance and nuisance abatement charges. Bank of America
7 responds that the Supreme Court of Nevada has already found an identical Miles Bauer letter to
8 be a valid tender. Additionally, Bank of America notes that arguments about maintenance or
9 nuisance abatement charges are irrelevant because there is no evidence of these types of charges
10 related to this property and any such charges arising later would not be part of the superpriority
11 lien unless the HOA filed a new notice of delinquent assessment lien.

12 The Supreme Court of Nevada has already held that where, as here, there is no evidence
13 of maintenance or nuisance abatement charges, identical Miles Bauer letters did not impose
14 impermissible conditions on tender. *See Bank of Am., N.A.*, 427 P.3d at 117-18; *BDJ Invs., LLC*
15 *v. Bank of Am., N.A.*, No. 76481, 448 P.3d 573, 2019 WL 4392466, at *1 (Nev. 2019) ("Because
16 nothing in the record indicates that the HOA had incurred any maintenance or nuisance
17 abatement charges at the time the tender was made, the letter cannot reasonably be construed as
18 forcing the HOA to waive its right to afford superpriority status to any such charges that might
19 be assessed in the future."); *Alliant Commercial, LLC v. Bank of New York Mellon*, No. 76565,
20 443 P.3d 544, 2019 WL 2725620, at *1 (Nev. 2019) ("Assuming without deciding that the tender
21 contained a misstatement of law, such a misstatement is not an impermissible condition as it does
22 not require anything of the HOA for the HOA to be able to accept the tender. Furthermore, no
23 such [maintenance and nuisance abatement] charges are at issue in this case. Thus, the purported

misstatement does not alter the tender’s legal effect.”). Because there is no evidence of maintenance or nuisance abatement charges, the tender letter did not contain impermissible conditions. Additionally, if such charges arose later, the HOA “would have been required to issue new foreclosure notices if it sought to afford those costs superpriority status.” *Doreen Properties, LLC v. U.S. Bank Nat’l Ass’n as Tr. for Holders of Bear Sterns Alt-A Tr. 2006-3*, No. 75885-COA, 2019 WL 2474893, at *1 (Nev. App. June 12, 2019) (citing *Property Plus Invs., LLC v. Mortgage Elec. Registration Sys.*, 401 P.3d 728, 731-32 (Nev. 2017) (en banc) (stating that the HOA is not limited to one superpriority lien but it must initiate a new foreclosure process to enforce a second superpriority default)).

D. Equities and Bona Fide Purchaser

SFR argues that even if Bank of America tendered the superpriority amount, I still must balance the equities before setting aside the sale, which would include an evaluation of SFR’s bona fide purchaser status. SFR also argues Bank of America waived the right to assert tender, should be equitably estopped from doing so, and has unclean hands. Bank of America responds that because the tender extinguished the superpriority lien as a matter of law, I should not balance the equities or consider SFR’s status as a bona fide purchaser. Alternatively, Bank of America argues that if I do, I should rule in its favor because it tendered, NAS wrongfully rejected tender, and the sale price was grossly inadequate. Finally, Bank of America argues waiver, estoppel, and unclean hands do not apply because it did what it was supposed to do to preserve the deed of trust by making a valid tender.

“[T]ender of the superpriority portion of an HOA lien satisfies that portion of the lien by operation of law.” *Bank of Am., N.A.*, 427 P.3d at 120. Because “valid tender cured the default as to the superpriority portion of the HOA’s lien, the HOA’s foreclosure on the entire lien

1 resulted in a void sale as to the superpriority portion.” *Id.* at 121. A “party’s status as a [bona
2 fide purchaser] is irrelevant when a defect in the foreclosure proceeding renders the sale void.”
3 *Id.* For these same reasons, I do not weigh the equities if tender was valid because “the voiding
4 of the foreclosure sale as to the superpriority portion of the lien is ultimately the result of the
5 operation of law and not equitable relief.” *Salomon v. Bank of Am., N.A.*, No. 75200-COA, 2019
6 WL 3231009, at *2 n.3 (Nev. App. July 17, 2019).

7 Finally, Bank of America “has not waived its right to protect its deed of trust, is not
8 estopped from asserting that right, nor does it have unclean hands because it allowed [the
9 HOA’s] foreclosure to proceed without interceding to halt the foreclosure” because Bank of
10 America satisfied the superpriority portion of the lien before the foreclosure, so it “was under no
11 obligation to intercede or halt the foreclosure once it protected its own interest.” *Bank of New*
12 *York Mellon v. Green Valley S. Owners Ass’n*, No. 1, No. 2:17-CV-2024-KJD-EJY, 2019 WL
13 4393356, at *6 (D. Nev. Sept. 13, 2019); *see also Bank of America, N.A.*, 427 P.3d at 119-21
14 (tender need not be recorded or deposited into court).

15 **E. Standing**

16 SFR contends that Bank of America lacks standing to enforce the note and deed of trust
17 because it has not produced the original note, deed of trust, or assignment to Bank of America. It
18 also argues that Bank of America must establish that the note and deed of trust have been
19 reunified through valid transfers to Bank of America. Finally, SFR contends Bank of America
20 cannot rely on the recorded documents or copies of those documents because in other cases it has
21 been shown that recorded documents were inaccurate or inauthentic.

1 Bank of America responds that it does not seek to enforce the note in this action so
2 arguments about the note are irrelevant. Bank of America contends it is undisputed that it is the
3 beneficiary of record for the deed of trust and SFR has presented no evidence to the contrary.

4 The question in this case is not whether Bank of America could presently foreclose. The
5 question is whether Bank of America has a sufficient interest in the deed of trust that it has
6 standing to seek declaratory relief as to the deed of trust's continuing validity. Bank of America
7 is the beneficiary of record. ECF Nos. 79-2; 79-3. SFR has presented no contrary evidence.
8 Bank of America therefore has standing to seek a declaration that the deed of trust remains an
9 encumbrance on the property. SFR's contention that some documents in other cases have been
10 shown to be incorrect or inauthentic does not raise an issue of fact in this case. SFR must show
11 "more than metaphysical doubt as to the material facts," and it "has not done so here."
12 *Berezovsky v. Moniz*, 869 F.3d 923, 933 (9th Cir. 2017) (quotation omitted). Speculation that
13 there might be errors is insufficient to preclude summary judgment. *Emeldi v. Univ. of Oregon*,
14 698 F.3d 715, 728 (9th Cir. 2012).

15 **F. Summary**

16 In sum, Bank of America has met its initial burden at summary judgment in showing that
17 it tendered the superpriority portion of the HOA's lien, thereby rendering the sale void as to the
18 deed of trust. SFR has not presented evidence raising a genuine dispute in response.
19 Consequently, SFR purchased the property subject to the deed of trust.

20 **G. SFR's Claim Against the Osunas**

21 SFR previously moved for default judgment against the Osunas, which I denied without
22 prejudice. ECF Nos. 77, 90. SFR must now either move for default judgment or voluntarily
23 dismiss that claim. A motion for default judgment must include proof of this court's diversity

1 jurisdiction over the cross-claim. If SFR does not take either of those actions, I will dismiss the
2 cross-claim without prejudice.

3 **II. CONCLUSION**

4 I THEREFORE ORDER that defendant SFR Investments Pool 1, LLC's motion for
5 summary judgment (**ECF No. 78**) is **DENIED**.

6 I FURTHER ORDER that plaintiff Bank of America, N.A.'s motion for summary
7 judgment (**ECF No. 79**) is **GRANTED**. The clerk of court is instructed to enter judgment in
8 favor of plaintiff Bank of America, N.A. and against defendant SFR Investments Pool 1, LLC as
9 follows: It is declared that the homeowners association's non-judicial foreclosure sale conducted
10 on April 7, 2014 did not extinguish the deed of trust and the property located at 8928 Marble
11 Light Avenue in Las Vegas, Nevada remains subject to the deed of trust.

12 I FURTHER ORDER that plaintiff Bank of America, N.A.'s alternative damages claims
13 against defendants Maravilla at Mountain's Edge Homeowners Association and Nevada
14 Association Services, Inc. are **DISMISSED** as moot.

15 I FURTHER ORDER that defendant Maravilla at Mountain's Edge Homeowners
16 Association's motion for summary judgment (**ECF No. 80**) is **DENIED as moot**.

17 I FURTHER ORDER by March 9 2020, cross-claimant SFR Investments Pool 1, LLC
18 must either move for default judgment or voluntarily dismiss its cross-claim against Arturo
19 Osuna and Gabriela Osuna. A motion for default judgment must include proof of this court's
20 diversity jurisdiction over the cross-claim. If SFR does not take either of those actions by that
21 date, I will dismiss the cross-claim without prejudice.

22 DATED this 18th day of February, 2020.

23 

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE